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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 136

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION AND BRIEF OF APPLICANT *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1105

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION AND BRIEF OF APPLICANT *AMICUS CURIAE*

Statement of the Case

Respondent, A/S Inger, owner of the vessel, SS. Elin Hope, was sued in the Eastern District of New York by one Damanti, employed by petitioner (hereinafter referred to as D&K) as the hatch boss in charge of a gang of 15-16 men engaged in unloading a cargo of newsprint paper from the No. 1 hatch of the vessel (D&K App. 7a-8a). Damanti was seriously injured when he, in place of one of his men, used a beam jack at the 'tweendeck level to assist in moving a hatch beam to enable the paper beneath to be taken out.

Pursuant to Rule 14(a), FRCP, Inger brought in, as parties who might be liable over to it, D&K and also the charterer of the vessel, not a party here. D&K answered not only the third-party complaint but plaintiff's com-

plaint as well (D&K App. 5a) under the provision of Rule 14(a):

> "The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim."

On May 13, 1957 the case came on for trial as to all parties and as to all issues before Judge Bruchhausen and a jury. Pursuant to Rule 14(a) and its answer D&K was entitled to and did, so far as it chose, defend plaintiff's claim against Inger; however, in view of D&K's claims here, Judge Bruchhausen's observation should be noted (Pet. p. 99):

> "The impleaded defendants in this action left the shipowner indemnittee with almost the whole burden of defeating the original claim. It was the shipowner who attempted to prove claimant's contributory liability, exaggeration of injuries, and absence of any breach of duty to the said claimant, so that if the $30,000 paid in settlement of the case was less than what a jury would have awarded, the shipowner alone deserves the credit."

On May 23, 1957, after all parties had rested and summations were due to commence, Inger's counsel in Chambers notified the third parties' counsel that Inger proposed to settle with plaintiff for $30,000 unless the third parties desired to take over the further defense of Inger, in which event the settlement would not be made, saying (Inger App. 53a; see also 54a):

> ". . . before effecting that settlement, the defendant offers formally to each of the third-party defendants the opportunity of stepping into the defendant's shoes in the trial of this action from this time forward, in behalf of the defendant."

The offer was summarily, indeed, scornfully rejected (Inger App. 54a-55a, D&K App. 228a). Thereupon, the

settlement was effected between Inger and plaintiff, plaintiff withdrew from the case without any protest by the third-party defendants, and the trial was continued limited to the third-party issues (Inger App. 57a). After testimony by Inger's counsel with regard to the settlement (Inger App. 58a) the third parties again rested and, following Inger's motion for a directed verdict against the third parties (D&K App. 234a), the third-party issues were submitted to the jury upon a special verdict under 2 series of questions, the first, as to the "Settlement with Plaintiff" and the second, as to the "Indemnity Claim" (Pet. p. 14). Upon the coming-in of the special verdict all parties made various motions, including a renewal by Inger of its motion for a directed verdict (D&K App. 258a-260a), all of which motions Judge Bruchhausen took under advisement; thereafter Inger made a comprehensive motion on papers (Inger App. 63a, D&K App. 266a). Judge Bruchhausen set aside the special verdict and ordered a new trial, denying all other motions (Pet. p. 94, 153 F. Supp. 600).

Following the dismissal by the Court of Appeals of the appeals by the third parties from Judge Bruchhausen's order, all parties waived a jury trial (Pet. p. 16); thereafter the non-jury trial was had before Judge Abruzzo, whose judgment dismissing the third-party complaint as to D&K was reversed by the Court of Appeals.

The Court of Appeals Decision

Concurring with three other circuits and disagreeing with none, the Court of Appeals held (Pet. 71) that proof of Inger's potential liability to plaintiff was sufficient to support the reasonableness of the settlement. So holding it found (Pet. 72-73) that the jury's determination, upon all of the evidence submitted to it, that the settlement was reasonable and the jury's further determination that the accident occurred through D&K's negligence required reversal of the judgment below and direction of judgment in

Inger's favor. The correctness of this decision is not doubtful.

In *Gallick* v. *B. & O. R. R. Co.*, 1963, 372 U. S. 108, this Court reiterated the rule that the court (p. 119):

> ". . . must attempt to reconcile the jury's findings, by exegesis if necessary . . . before we are free to disregard the jury's special verdict."

At bar, the Court of Appeals (Pet. 72-73) applied this injunction and found no difficulty in reconciling the answers of the jury upon the basis of what was properly dispositive of the issues presented for determination.

On the question of the reasonableness of the settlement the jury found (Pet. 14):

> "(A) SETTLEMENT WITH PLAINTIFF.
>
> "1. Was the payment by the shipowner of $30,000 in settlement of plaintiff's claim a reasonable compromise under all of the testimony submitted to you on this trial? Yes."

The Court of Appeals found this to be a complete and sufficient answer to the question of reasonableness, making a brief resumé of the proof both as to liability and damages to indicate the correctness of the jury's response "under all of the testimony". The seeming contradictions between that answer and the jury's answers to further questions as to whether the settlement was "clearly erroneous" as to liability and whether the jury could "possibly" have found Inger liable, the Court of Appeals disposed of (Pet. 73) by the correct ruling that the jury's view of the merits of plaintiff's case as such was irrelevant to the actual issue presented for decision, viz., the reasonableness of the settlement based on potential liability (Cf. Charge, D&K App. 237a, 244a, 246a). Since these were not "proper" questions they were correctly disregarded as immaterial (*Gallick* v. *B. & O. R.R. Co.*, *supra*; *Gutierez* v. *Waterman S.S. Corp.*, 1963, —— U. S. ——, decided May 13, 1963).

The argument of *amicus curiae* on this point loses all semblance of sincerity or seriousness when it is observed that its attributes the jury's answer quoted above to the Court of Appeals as an original, unwarranted, "substituted" finding by the court (Brief, 8), and wholly ignores the fact that the jury made the finding. It ignores it for the obvious reason that it cannot reconcile the sweep of the conclusive effect of the finding with its ostrich effort to give exclusive finality to the subsequent answers to the irrelevant questions 2 and 3. The meaning of the legal concept "clearly erroneous" (Rule 12(a) FRCP) was not explained to the jury in the charge; nor was the concept embodied in question 3 explained to them. Putting their own interpretation upon these questions the jury reasonably concluded that they were intended to elicit what their findings would have been if plaintiff's case had been submitted to them upon the merits. Since such questions were irrelevant to the question of reasonableness based upon potential liability, which implicitly assumed that upon the merits a finding of non-liability on Inger's part was possible, the questions of what the jury would have found if the settlement had not been made was entirely irrelevant. Accordingly, the reconciliation effected by the Court of Appeals adopted the answer to the question No. 1, which embraced the whole issue to be decided, and disregarded the answers to the subsequent questions because they had no bearing upon the issue for decision and were not dispositive thereof. Therefore, the Court of Appeals did not presume itself to determine the question but, in accordance with this Court's admonition, gave effect to the jury's determination of it.

On the question of D&K's breach of its warranty of workmanlike service, the jury found (Pet. 14):

> "(B) INDEMNITY CLAIM
>
> "1. Were the agents, servants or employees of the stevedoring contractor negligent or careless is any way? Yes."

2. If yes, was such negligence the primary and active cause of plaintiff's injuries? Yes.

3. If yes, what was the nature of such negligence? Carelessness."

In view of contentions to be later considered (pp. 13-15), it may be noted that nothing in the answers warrants the assumption that the negligence found was based upon plaintiff's operational negligence.

The Court of Appeals found (Pet. 73) the above answers sufficient to sustain D&K's liability-over for breach of its warranty of workmanlike service, and therefore directed judgment in Inger's favor.

The Questions Presented for Review

The petition (2-6) purports to present for review, in paragraphs and sub-paragraphs, some 14 or more questions or variations of questions. To simplify the task thus presented to the Court, if possible, we have reduced this maze to three general propositions:

1. That constitutional rights under the Fifth and Seventh Amendments were violated in that it was deprived of its right "in its own name" to litigate with plaintiff the question of Inger's liability to plaintiff.

2. That the Court of Appeals' ruling that proof of potential liability of Inger to plaintiff was sufficient to establish the reasonableness of the settlement as to liability, was erroneous.

3. That petitioner could not be held guilty of a breach of its warranty of workmanlike service on the basis of plaintiff's operational negligence.

That none of these contentions has merit or warrants review by this Court may be readily shown.

Summary of Argument

I. No constitutional question is presented because no constitutional right of D&K was infringed; D&K was not deprived of nor denied its right to litigate with plaintiff; it never claimed the right after the settlement was announced but intentionally waived it by conduct; and the contention is a transparent afterthought.

II. The ruling that proof of Inger's potential liability to plaintiff was sufficient to establish the reasonableness of the settlement as to liability accords with similar rulings in three other circuits, is contrary to no decision of this Court or any Court of Appeals, and presents no case for certiorari.

III. The contention that plaintiff's "operational negligence" was the basis upon which petitioner was held guilty of breach of warranty is erroneous. The jury's finding was that the accident was caused by the "carelessness" of the "agents, servants or employees" of petitioner, in other words, petitioner itself. The questions of law sought to be presented upon the basis of the erroneous assumption are therefore academic, not warranting review.

POINT I

No constitutional question is presented because no constitutional right of D&K was infringed; D&K was not deprived of nor denied its right to litigate with plaintiff; it never claimed the right after the settlement was announced but intentionally waived it by conduct; and the contention is a transparent afterthought.

D&K's contention (e.g. Pet. 21, 27) that it was deprived of the right "in its own name" to litigate with plaintiff Inger's defenses to plaintiff's claims is disproved by the record. Patient search of D&K's prolix and diffuse, rather than "direct and concise argument" (Rule 23 [h]), fails

to disclose how and when such deprivation took place, what protest was made against it, and what demand was made for recognition of the right. Manifestly, such deprivation could only have occurred upon the trial before Judge Bruchhausen since, admittedly (Pet. 16), prior to the trial before Judge Abruzzo all parties waived a second jury trial.

Undeniably, prior to the settlement, D&K was afforded full opportunity to litigate with plaintiff (Pet. 7), however meagerly that opportunity was availed of. Accordingly, the deprivation must have occurred, if at all, in connection with and following the settlement proceedings. But when the record is examined it is found that, far from asserting the right, which is now importunately proclaimed to have been infringed, D&K, in effect and in substance, refused to avail itself of that right and more when Inger offered to permit it to take over the defense; and further, far from demanding the right "in its own name (to) question . . . plaintiff's claim against the shipowner . . ." (Pet. 21), D&K vehemently and repeatedly insisted that Inger was required to procure an adjudication of its liability to plaintiff as one of the elements of its claim-over. In Chambers, its counsel said (D&K App. 228a):

> "He has to prove his liability to plaintiff, as against my client . . . He must prove that plaintiff's case from beginning to end against my client and his case against us."

The petition, in a footnote to page 32, sets forth that D&K's contention was (p. 32, footnote):

> ". . . it (Inger) would have to assume plaintiff's burden of establishing its initial liability to him in fact and in law . . .".

It is, of course, settled that the constitutional right to a jury trial must be raised at the appropriate time or be

deemed waived, by "mere acquiescence when the party or his counsel is present and not objecting . . ." (*Bass* v. *Hoagland*, 5 Cir., 1949, 172, F. 2d 205, 209, cert. den. 338 U. S. 816; see also: *Daignan* v. *United States*, 1927, 274 U. S. 195, 198; *United States* v. *Moore*, 1951, 340 U. S. 616, 621; *Knell* v. *Feltman*, 1949, D. C. Cir., 174 F. 2d 662, 665).

At bar, the appropriate occasion for the demand of the right to continue to litigate directly with plaintiff and in such litigation to have the jury determine Inger's liability to plaintiff was when, in open court, Judge Bruchhausen permitted plaintiff to withdraw from the case and limited the remaining issues to be tried to those involved in the third parties' liability for the settlement (Inger App. 57a):

> "'I don't think there is anything for you to do, between the plaintiff and the shipowner. But there are still issues to be tried between the defendant, shipowner, as against the other parties, the time charterer and Daniels & Kennedy.'"

At that point, if it really wished to litigate further with plaintiff, D&K should have asserted that it wished to do so "in its own name" and that for that purpose plaintiff should be required to remain in the case. Its right to make that demand was secured by Rule 41(a)(2) FRCP that after answer filed

> ". . . an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court shall deem proper."

Since D&K had answered the complaint (D&K App. 5a) plaintiff could not have taken a dismissal as to D&K without the latter's consent except by order of the court. If then D&K had really wished to continue to litigate with plaintiff "in its own name" and had objected to any dismissal as against it Judge Bruchhausen would have been called upon to rule whether plaintiff should be permitted

to withdraw as against D&K (5 Moore, Fed. Pract. [2 Ed.], pp. 1018-1025; *Cone v. West Virginia Paper Co.*, 1947, 330 U. S. 212, 217), and an adverse determination would now be subject to review.

Having failed to make any such demand, a failure due to D&K's lack of desire, indeed, refusal, to litigate directly with plaintiff, evidenced by its counsel's unequivocal contention that Inger had the obligation to establish its liability to plaintiff, it is patent that the claim now asserted is wholly an afterthought, without any substance, and that the alleged infringed right was not only not sought but waived by D&K's conduct in seeking to put the burden of proof of liability on Inger.

POINT II

The ruling that proof of Inger's potential liability to plaintiff was sufficient to establish the reasonableness of the settlement as to liability accords with similar rulings in three other circuits, is contrary to no decision of this Court or any Court of Appeals, and presents no case for certiorari.

In the decision below, the Second Circuit (see also *Kokusai K.K.K. v. Columbia Steve. Co.*, 1938, 23 F. Supp. 403, 406, affirmed 2 Cir., 100 F. 2d 1016) has joined the Seventh Circuit (*Chicago R. I. & P. R.R. Co.*, C. C. A. 1955, 220 F. 2d 939, 941), the Third (*Hankinson v. Penn. R.R. Co.*, 1960, 280 F. 2d 249, 252), and the Ninth (*California S. & B. Co. v. Pan-Atlantic SS Corp.*, 1961, 291 F. 2d 252, 254) in holding that proof of facts establishing potential liability of an indemnitee to a claimant is sufficient to support a claim over against the indemnitor for a reasonable amount paid in settlement. This ruling accords not only with reason and justice but with the rationale if not the explicit rulings of this and other high courts (*St. Louis Dressed Beef Co. v. Maryland Cas. Co.*, 1906, 201 U. S. 173, 181; *Leonardi*

v. *Standard Acc. Ins. Co.*, 2 Cir., 1954, 212 F. 2d 887, 890; *Cardinal* v. *State*, 1952, 304 N. Y. 400, 418, cert. den. 345 U. S. 918; *Graf* v. *Boston Gas Light Co.*, 1873, 114 Mass. 149, 153); and, although not explicitly stated, was the basis for holding the indemnitor in *Penn. R.R. Co.* v. *McAllister*, 2 Cir., 1957, 240 F. 2d 423, upon which D&K relies (Pet. 40). That the proof was more than sufficient to make out a case of potential liability (a case which would have had to be submitted to the jury, whose verdict would have been unassailable [e.g., *Michalic* v. *Cleveland Tankers*, 1960, 364 U. S. 325, 329-330]) is established by the brief resumé of the proof in Judge Smith's opinion below (Pet. 72) and is, in effect, conceded (Pet. 10).

Petitioner's copious quotations from various state courts which appear to lay down a contrary rule are neither apposite nor persuasive. Thus, *Tugboat Indian, Co.* v. *A/S Ivarans Rederi*, 344 Pa. 15, upon which petitioner heavily relies, in holding that the pendency of a lawsuit is not such a compulsion as will warrant a settlement (Pet. 45-46) is directly in conflict with the ruling of this Court in the *St. Louis Dressed Beef* case, *supra*, where Mr. Justice Holmes said (201 U. S., p. 182):

> "... a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution."

Nor is it apt to cite decisions holding a case against an indemnitor is not made out where there is *no* proof, viz., a failure of proof, of liability; in other words, where there is no proof of potential liability. Such was the case of *The Toledo*, 2 Cir., 1941, 122 F. 2d 255, which D&K cites (Pet. 39).

The rule applied below accords with the principle laid down in the leading New York case of *Dunn* v. *Uvalde A.L.P. Co.*, 1903, 175 N. Y. 248, quoted by D&K (Pet. 42) that to support a settlement the indemnitee must "prove the

actionable facts upon which his liability depends", language adopted by *Corpus Juris Secundum* (Pet. 38-39). The attempt to equate this rule with adjudication of liability upon conflicting evidence is palpably erroneous. If such an adjudication had been meant the court surely would have said so. What was meant was that, to avoid the charge of being a mere volunteer, the indemnitee is required to prove that it settled under the compulsion of facts which established potential liability.

The contention of *amicus curiae* (Brief, 14) that the rule of potential liability is "invidious (and) economically unsound" besides being irrelevant to any legal question is plainly groundless. The facts with respect to an accident are best known to the stevedore because the operations are carried on by the stevedore and the men directly involved therein are its men and its supervisors of them, men who, while readily available to the stevedore's investigators are not available to the shipowner except by the stevedore's sufferance. If the defense of an action is "lackadaisacal", as was D&K's before Judge Bruchhausen (p. 2, *infra*) the stevedore has only itself to blame since Rule 14(a) gives it full opportunity to present the shipowner's defenses.

On the other hand, the stevedores completely ignore the shipowners' at least equal right to settle, when confronted with the claims of the stevedores' employees which the stevedores refuse to defend. They would have the shipowners carry the litigation to the bitter end, at the latter's expense and risk, because the stevedore is unwilling to settle or hopes the claimant may lose. The right, in good faith, to settle, is thoroughly established and its practice is judicially encouraged (e.g., *Palliaga* v. *Lackenbach SS Corp.*, 2 Cir., 1961, 301 F. 2d 403, 409). That right would be seriously impaired and its encouragement a kind of entrapment if the reasonableness were later to be judged by the subsequent adjudication of liability upon conflicting evidence, some of which might be lost or unavailable.

At bar, if D&K was so confident of the jury's verdict as against plaintiff it would have attested its confidence by demanding that plaintiff remain in the case and submit his claims to the jury. Its refusal so to do challenges its good faith. So in future practice, a stevedore may always protect itself by prompt use of the facilities of investigation which are most fully available to it, and by joining in or taking over the defense if it believes that proper or adequate presentation thereof is not being made.

The ruling below was, therefore, correct. Moreover, no showing has been made of any conflict with other courts within the provisions of Rule 19(1)(b), necessary to warrant certiorari.

POINT III

The contention that plaintiff's "operational negligence" was the basis upon which petitioner was held guilty of breach of warranty is erroneous. The jury's finding was that the accident was caused by the "carelessness" of the "agents, servants or employees" of petitioner, in other words, petitioner itself. The questions of law sought to be presented upon the basis of the erroneous assumption are therefore academic, not warranting review.

Erroneously contending (Pet. 58) that "the sole cause of the accident was plaintiff's operational negligence" D&K, and also *amicus curiae* (Brief, 9) argue that such negligence could not support a charge of breach of warranty against D&K.

Beyond argument, D&K's obligations under its warranty of workmanlike service were distinct from those of Inger to plaintiff (*Ryan Stevc. Co. v. Pan-Atlantic S.S. Corp.*, 1956, 350 U. S. 124, 134; *Weyerhaeuser S. S. Co. v. Nacirema Op. Co.*, 1958, 355 U. S. 563, 567; *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U. S. 539, 549). The only factual de-

termination on that issue was made by the jury, Judge Abruzzo not reaching the question (Pet. 85-86). As we have heretofore pointed out (p. 6, *infra*) the jury's answers on the "Indemnity Claim" made no mention of plaintiff; therefore, the contention that plaintiff's operational negligence was the sole or even any basis for the finding of D&K's breach of warranty is an unsupported unwarranted assumption without any support in the record. To the contrary, the jury's finding that the accident was caused by the "carelessness" of D&K's "agents, servants or employees" placed the responsibility squarely on D&K's shoulders and not plaintiff's. This was in accord with the charge which did not limit the jury's consideration of the issue to plaintiff's conduct but authorized consideration of all of the evidence bearing upon D&K's performance (D&K App. 241a-243a). The contention of *amicus curiae* (Brief, 9) that Inger's claim against D&K was limited to plaintiff's operational negligence is incorrect. Examination of the citation to the record in support of the contention (D&K App. 247a) discloses that Inger's request to charge was merely that D&K was bound by whatever knowledge plaintiff had, with no reference being made to plaintiff's negligence, operational or otherwise.

The premise being unfounded, the questions of law sought to be presented thereon are academic and illusory and therefore neither present questions for certiorari or consideration here.

Even so, it may be pointed out how erroneous is the assumption that the workmen's compensation shield is a complete answer to D&K's liability for breach of warranty insofar as it is founded by plaintiff's faulty performance (*Ryan Stev. Co. v. Pan-Atlantic S.S. Corp.*, *supra*, pp. 131-132; *Weyerhaeuser S.S. Co. v. United States*, 1963, 372 U. S. 597, 602-604; *Treadwell v. United States*, 1963, 372 U. S. 752; *Reed v. Steamship Yaka*, 1963 U. S. , decided May 27, 1963).

At bar, plaintiff was more than a mere workman: he was clothed with the supervisory duties of a foreman by being made hatch boss over a gang of 15 or 16 men (Inger App. 7a-8a, 79a-80a). In that capacity he stood for D&K in carrying out its obligation of workmanlike service; his knowledge was its knowledge, and his substandard performance was its substandard performance (Restatement of Agency (2 Ed.) §§ 272, 495-497; 3 CJS Agency §§ 262-266; 2 Amer. Juris., Agency §§ 368-370, 374-375, 582; *Greenspahn v. Seagram*, 2 Cir., 1950, 186 F. 2d 616, 619, 620; *Caraballese v. Naviera Azmay R. A.*, 2 Cir., 1960, 285 F. 2d 355, 359; *Parenzan v. Iimo KKK*, 2 Cir., 1957, 251 F. 2d 928). Furthermore, the concession that D&K had made no prior inspections of the beam jacks and left it to its men to do so at their own risk (Inger App. 43a, 76a, 80a) was further proof, *inter alia*, to support the finding of D&K's "carelessness" and, in consequence, breach of warranty (*Weyerhaeuser S.S. Co. v. Nacirema Co.*, *supra*; *Michalic v. Cleveland Tankers, Inc.*, *supra*; *A. & G. Stevedores, Inc. v. Elderman Lines, Ltd.*, 1962, 369 U. S. 355, 364).

Since the finding of the jury was supported by the evidence and followed the charge it was properly held conclusive on the question of D&K's breach of warranty.

The petition for certiorari should be denied.

Respectfully submitted,

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